Chong Yoong Choy v UOL Factoring Sdn Bhd

COURT OF APPEAL (MALAYSIA) — CIVIL APPEAL NO W-02-183-95
GOPAL SRI RAM, SITI NORMA YAAKOB AND AHMAD FAIRUZ JJCA
9 FEBRUARY 1996

***Contract** — Estoppel —Promise made by guarantor — Factoring agreement — Guarantor expressly undertook obligation as principal debtor — Whether inequitable and unconscionable to permit guarantor to now assert that promise he gave was unenforceable*

***Contract** — Assignment — Factoring agreement — Guarantor guaranteed due payment for goods and services supplied by assignor to debtor — Debtor defaulted — Whether assignor could sue guarantor for payment in respect of building contract — Whether bills in respect of building contract could be factored*

Prebore Piling and Engineering Sdn Bhd ('Prebore') had agreed to supply goods and services on credit to Pembinaan Gunung Mewah Sdn Bhd ('Gunung Mewah'). Prebore then entered a factoring agreement with UOL Factoring Sdn Bhd ('the respondent') to factor its bills to Gunung Mewah. The instant appellant acted as one of the guarantors, guaranteeing, both as surety and as principal debtor, the due performance by Gunung Mewah of its obligations under the factoring agreement. Upon the latter's default to make payment, the respondent instituted summary proceedings against the appellant to recover the amount due. In the High Court, the appellant argued that: (i) invoices in respect of a building contract, including certificates of payment could not be factored, as he had only guaranteed due payment for goods and services supplied by Prebore to Gunung Mewah; and (ii) the contractual relationship between Prebore and Gunung Mewah had been varied and that he was accordingly discharged from any further liability under the guarantee. The High Court judge found that there was no triable issue, and entered judgment against the appellant. The appellant appealed.

Held, dismissing the appeal:

(1) Any lawful debt may be factored, that is to say, may be assigned, and the court does not perceive that the position to be any different because the obligation to pay arises out of a building contract (see p 424C).

(2) The appellant had expressly undertook the obligations of a principal debtor under the guarantee that he executed. It did not matter what happened between the assignor (Prebore) and the debtor (Gunung Mewah). As far as the respondent was concerned, it entered into the factoring arrangement encouraged by the appellant's promise to play the role of surety as well as principal debtor (see p 424D).

(3) Under the doctrine of estoppel, it would be entirely inequitable and unconscionable to permit the appellant to now assert that

the promise he gave, and upon the strength of which the respondent acted, was unenforceable (see p 424F–H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed.

[Bahasa Malaysia summary

Prebore Piling and Engineering Sdn Bhd ('Prebore') bersetuju untuk membekalkan barangan dan perkhidmatan secara kredit kepada Pembinaan Gunung Mewah Sdn Bhd ('Gunung Mewah'). Prebore kemudiannya mengikat suatu perjanjian pemfaktoran dengan UOL Factoring Sdn Bhd ('penentang') untuk memfaktorkan bilnya kepada Gunung Mewah. Perayu dalam kes ini telah menjadi seorang daripada penggerenti, untuk menggerenti, sebagai kedua-duanya penjamin dan penghutang utama, pelaksanaan wajar kewajipan Gunung Mewah di bawah perjanjian pemfaktoran tersebut. Atas keingkaran Gunung Mewah untuk membuat bayaran, penentang pun memulakan prosiding terus terhadap perayu untuk mendapat kembali amaun yang perlu dibayar. Dalam Mahkamah Tinggi, perayu menghujah bahawa: (i) invois yang berkenaan deangan suatu kontrak pembinaan, termasuk perakuan pembayaran, tidak boleh difaktorkan, kerana dia hanya menggerenti pembayaran yang sewajarnya bagi barangan dan perkhidmatan yang dibekalkan oleh Prebore kepada Gunung Mewah; dan (ii) perhubungan kontrak antara Prebore dan Gunung Mewah telahpun diubah, dan oleh itu dia telah dilepaskan daripada sebarang tanggungan yang selanjutnya di bawah gerenti. Hakim Mahkamah Tinggi mendapati bahawa tidak terdapat isu yang boleh dibicarakan, lalu memasukkan penghakiman terhadap perayu. Perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Sebarang hutang yang sah boleh difaktorkan, iaitu, boleh diserahhak, dan mahkamah tidak dapat melihat bahawa kedudukan akan menjadi berbeza kerana kewajipan untuk membayar timbul daripada kontrak pembinaan (lihat ms 424C).

(2) Perayu telah secara nyata menjanjikan kewajipan seorang penghutang utama di bawah gerenti yang dia telah sempurnakan. Apa yang berlaku antara pemyerahhak (Prebore) dan penghutang (Gunung Mewah) tidak ada kena mengena dengan perayu. Sejauh ia melibatkan penentang, penentang telah mengikat perjanjian pemfaktoran selepas digalakkan oleh janji perayu untuk memainkan peranan sebagai penjamin dan penghutang utama (lihat ms 424D).

(3) Di bawah doktrin estopel, adalah benar-benar tidak saksama dan tidak berpatutan untuk membenarkan perayu untuk menyatakan kini bahawa janji yang dia berikan itu, dan yang penentang telah bertindak akibat pergantungan ke atasnya, tidak boleh dikuatkuasakan (lihat ms 424F–H); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.

A **Notes**

For cases on estoppel, see 3 Mallal's Digest (4th Ed, 1994 Reissue) paras 1542–1548.

For cases on assignment, see 3 Mallal's Digest (4th Ed, 1994 Reissue) paras 1153–1174.

B **Case referred to**

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

C **Appeal from:** Summons No D5–22–510–94 (High Court, Kuala Lumpur)

TK Lee (Tai King & Partners) for the appellant.

VK Natarajan (Michelle Ong with him) *(Kumar Jaspal Quah & Aishah)* for the respondent.

D **Gopal Sri Ram JCA**: The appellant, the third defendant in the court below, has appealed against the decision of Abdul Malek J (now JCA) entering summary judgment in the sum of RM1,077,697.28 against him as guarantor. The matter arose in this way.

E A company known as Prebore Piling and Engineering Sdn Bhd ('Prebore') agreed to supply goods and services on credit to another company, Pembinaan Gunung Mewah Sdn Bhd ('Gunung Mewah'). Prebore then approached the respondent in this appeal with a request to factor its bills to Gunung Mewah. A factoring agreement was then entered into between Prebore and the respondent formalizing the arrangement. F The instant appellant and another person executed a guarantee in the respondent's favour, guaranteeing, both as surety and as principal debtor, the due performance by Gunung Mewah of its obligations under the factoring arrangement.

From time to time, Prebore invoiced Gunung Mewah for goods and G services supplied and presented these invoices to the respondent for discounted payment. The respondent duly paid off the agreed percentage on the invoices to Prebore and claimed the full value of the same from Gunung Mewah. Upon the latter's default to make payment, the respondent instituted proceedings to recover the amount due. The appellant was, as earlier observed, the third defendant in those proceedings. The respondent, H in due course, took out a summons for judgment. The learned judge entered judgment for the sum claimed less RM220,000 which had been paid on 31 May 1994.

In the court below, the appellant opposed the summons for judgment on a number of grounds. However, before us, Mr TK Lee of counsel who I argued the appeal limited his criticism of the judge's decision to two broad points.

First, he submitted that what his client had guaranteed was due payment for goods and services supplied by Prebore to Gunung Mewah. However, his client was being called to meet a claim of quite a different nature, namely, one made under a building contract.

Second, counsel submitted that the contractual relationship between Prebore and Gunung Mewah had been varied and that his client was accordingly discharged from any further liability under the guarantee.

The learned judge examined the appellant's complaints with care and found no merit in any of them. We did likewise and came to the same conclusion as the learned judge.

In the first place, the documents produced in the summary proceedings show that the respondent's claim falls squarely within the terms of the factoring agreement. It appeared that counsel was suggesting that invoices in respect of a building contract, including certificates of payment could not be factored. We do not agree. Any lawful debt may be factored, that is to say, may be assigned, and we do not perceive that the position to be any different because the obligation to pay arises out of a building contract. Counsel's argument on the first ground therefore is without merit.

The answer to counsel's second argument is to be found in the very guarantee which his client executed. Under cl 1 of that document, the appellant expressly undertook the obligations of a principal debtor. So it really does not matter what happened between the assignor (Prebore) and the debtor (Gunung Mewah). As far as the respondent is concerned, it entered into the factoring arrangement, encouraged, no doubt, by the appellant's promise to play the role of surety as well as principal debtor, thereby assuring the respondent that he would answer the debtor's default.

Ought the appellant, having so encouraged the respondent to act, be permitted now to assert that the promise he gave, and upon the strength of which the respondent acted, is unenforceable for any number of reasons? We believe that justice and conscience move for a negative response to that question. It would, in our judgment, be entirely inequitable and unconscionable to permit the appellant to pursue such a course.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court dealt with the nature, purport and legal effect of factoring agreements. It is not necessary for us to repeat all that was said in that case. Suffice to say that that was a case in which the doctrine of estoppel was invoked to lend commercial efficacy to a factoring agreement. The facts of the present case also come within the broad purview of that doctrine, and we are of the view that a different principle does not apply merely because the appellant is the guarantor of the debt and not the debtor himself.

The learned judge was entirely correct in coming to the conclusion that there were no triable issues in this case. Indeed, we are of the same view.

For these reasons, the appeal was dismissed with costs.

Appeal dismissed.

Reported by Isabel Liong